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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CATHERINE FOY,

Plaintiff and Appellant,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Defendant and Respondent,

REBECCA SIMON,

Defendant and Appellant.

2d Civil No. B154861
(Super. Ct. No. 1038337)
(Santa Barbara County)

Catherine Foy, the plaintiff, and Rebecca Simon, a defendant, appeal the order granting summary judgment in favor of defendant Regents of the University of California (hereafter Regents). We affirm the summary judgment granted to the Regents because its employee, Simon, was not within the scope of her employment while driving her car when it collided with Foy's automobile.

FACTS

Simon was a part-time research assistant for the Regents. She administered tests to elementary school students at several schools. She drove her own car to the schools. Her supervisor, Janet Brown, agreed to pay Simon for her time driving from her

home to the schools and from the schools back to her home. She was not otherwise reimbursed for her travel expenses.

On the morning of June 8, 2000, Simon left home and drove her car to a gas station to purchase fuel. She was at the gas station for 10 minutes and by chance she met her son and grandson there. Her grandson asked her for a ride to school. Simon agreed and drove him to his school and left him at a parking lot. She then drove out of the parking lot and headed to the direction of her home. Shortly thereafter, her car collided with Foy's vehicle.

After the accident, Simon went home and cancelled her testing appointment. She did not go to work that day, but she recorded one-half hour in her timesheet and it was approved by Brown. Foy sued Simon and the Regents for negligence.

Simon's Deposition Testimony

Simon testified she drove her car to buy gas at 8:30 a.m. She was not entitled to be paid or record time on her timesheet for that hour. In response to how many hours she worked on the day of the accident, she responded, "Zero. I never made it to work." She said that she only had approval for travel time for 20 minutes to and 20 minutes from the job site. She was scheduled to be at school at 9:30 a.m., and the accident occurred at 8:52 a.m. She said it was her routine to get gas and then return home to pick up her testing equipment before she left from home to go to the school sites. Her employer neither required her to do that nor to obtain gas at any particular gas station. She bought gas "[a]t least once a week."

Regents' Motion for Summary Judgment

The Regents moved for summary judgment relying primarily on Simon's deposition testimony to show she was not acting within the scope of her employment. Simon's opposition included her declaration which stated, among other things: "After the accident, it was simply understood that I was working at the time of the accident . . . . I reported it to UCSB because I felt I was working at the time. . . . I recorded one-half hour from my starting time of 8:30 a.m. [on the time card and] was paid for that one-half

hour. . . ." Foy's opposition stated, among other things, "if the court is inclined to grant the Regents' motion, plaintiff respectfully requests that a ruling on the motion be continued until after the plaintiff completes Ms. Brown's deposition and provides additional evidence."

At the hearing, the court's initial tentative was to either grant summary judgment or grant Foy's request for a continuance so Brown could be deposed. During oral argument, the court indicated there might be an issue of fact and that evidence from Brown might be helpful. The Regents suggested submitting Brown's declaration. Foy's counsel responded, "if the Regents are submitting a declaration from Janet Brown, of course we need to take her deposition." The court continued the motion to allow the parties to depose Brown and, with the consent of the parties, set new deadlines for the filing of additional evidence.

The Regents filed Brown's declaration which stated, "I assumed from what [Simon] told me that she had gotten in the accident while driving to a Santa Barbara school to do testing. Based upon this assumption, when Rebecca Simon recorded a half hour on her time sheet for the day of the accident, I approved it, thinking it reasonable that she should be compensated for her approximate time spent that day driving to the school prior to the time that the accident occurred, along with the time she spent that day calling various people to cancel the testing after the accident. [¶] . . . [¶] I did not learn until later . . . that the accident occurred while . . . Simon was returning to her home after going to the gas station and <u>not</u> while she was driving from her home to a Santa Barbara school."

Foy and Simon filed supplemental responses relying on Simon's prior declaration and Brown's deposition. They argued that Brown admitted initially signing the timesheet and approving payment for the half hour on June 8, 2000. They noted that Brown stated that the testing materials at Simon's house were necessary materials for the testing appointment on June 8.

The trial court found the accident occurred "outside the scope" of Simon's approved travel time. It found the facts to be similar to those in *Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, and granted summary judgment for the Regents.

DISCUSSION

I. Simon's Standing to Appeal

The Regents moved to dismiss Simon's appeal claiming she lacks standing to appeal because as a codefendant she is not aggrieved by their "exoneration." We disagree. The summary judgment involves the vicarious liability of her employer for personal injuries. This appeal will determine whether Simon by herself, or with her employer, has to face potential liability. Simon's interest in the impact of this appeal on her future financial security is not so remote as to deny her standing to appeal. (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 10.)

II. Respondeat Superior and the Scope of Simon's Employment

Foy and Simon contend that the trial court erred by granting summary judgment because Simon was within the scope of her employment at the time of the accident. We disagree.

"Because a summary judgment motion raises only questions of law, we review the supporting and opposing papers independently to determine whether there is a triable issue as to any material fact." (*Benavidez v. San Jose Police Dept.* (1999) 71 Cal.App.4th 853, 859.) "'Under the doctrine of respondeat superior, an employer is vicariously liable for his employee's torts committed within the scope of the employment. . . .'" (*Tryer v. Ojai Valley School* (1992) 9 Cal.App.4th 1476, 1480.) To impose such liability, "the employee must be "'engaged in the duties which he was employed to perform' [or] 'those acts which incidentally or indirectly contribute to the [employer's] service.'" [Citations.]" (*Id*. at p. 1481.) "'[T]he employer is not liable when the employee is pursuing 'his own ends.'" (*Ibid*.)

"Generally, an employer is not responsible for torts committed by an employee who is going to or coming from work." (*Tryer v. Ojai Valley School*, *supra*, 9 Cal.App.4th at p. 1477.) But there are exceptions to this "going and coming" rule. It

may not apply where: 1) employees must have their cars available to drive on company business (*Huntsinger v. Glass Containers Corp. (Fell)* (1972) 22 Cal.App.3d 803, 810; *Largey v. Intrastate Radiotelephone, Inc.* (1982) 136 Cal.App.3d 660, 668), 2) the employee is on a special business errand (*Tarasco v. Moyers* (1947) 81 Cal.App.2d 804, 810), or 3) the employer paid the employee for time going to and coming from work for the benefit of the employer (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962).

Foy and Simon contend that these exceptions to the "going and coming rule" apply. But in each of the cited cases involving exceptions, the employees were either driving directly to or directly from work at the time of the accident. By contrast, Simon drove her grandson to school and then was returning home immediately before the collision. She was not driving directly to work.

Foy and Simon contend that even though Simon drove her grandson to school, the trip was a special business errand as it started with her purchase of gas. They claim but for the accident, Simon, pursuant to habit, would have driven home, picked up her testing materials, checked her phone messages, and then driven to work. But as the Regents correctly note, this factual scenario is similar to *Le Elder v. Rice*, *supra*, 21 Cal.App.4th 1604, where this same claim was rejected.

In *Le Elder*, the employee, a service manager for McDonnell Douglas, had an accident after driving his children to school. The employer required him to drive his car on the job at least 5,000 business miles annually and to be on call 24 hours a day, 7 days a week. He scheduled his own working hours, locations and the employer reimbursed him for mileage and maintenance costs for his car. He had intended to return home after the accident to make a business call. The Court of Appeal concluded that the employee at the time of the accident was not within the scope of employment. It stated the purpose of the "injury-producing activity," driving the children to school, was a "personal activity." (*Le Elder v. Rice*, *supra*, 21 Cal.App.4th at pp. 1605-1608.) It stated, "'. . . [h]is intention to make a business call from his home rather than his office was for his own benefit . . . .'" (*Ibid*.)

As in *Le Elder*, Simon's activity of driving her grandchild to school was a personal errand. Her personal habit of buying gas and then driving home to pick up materials and retrieve messages before leaving for work was her own choice. Simon admitted her employer did not require her to do that. This trip therefore did not fall within the special business errand exception to the going and coming rule. (*Blackman v. Great American First Savings Bank* (1991) 233 Cal.App.3d 598, 604.) Because Simon had exclusive control over managing these matters on her own time, the Regents were not vicariously liable. (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1059 [school district not vicariously liable for an accident where employee was driving to be fingerprinted, a mandatory requirement, because employee had "discretion to decide when, where and how to fulfill the mandate"].)

Foy and Simon contend that Brown approved Simon's timesheet for one-half hour which included the time of the accident. They argue there was a triable issue of fact as to whether at that time Simon was working on employer approved hours. But "[a]n issue of fact can only be created by a conflict of evidence." (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196.) Brown's declaration stated her initial approval was a mistake. She assumed Simon was driving to work at the time of the accident. Foy had to show it was more probable than not, that Brown's initial approval was not a mistake. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857.) But neither Foy nor Simon controverted Brown's declaration with one from Simon. They rely on Brown's deposition where she stated she initially approved the timesheet. But that was not in dispute, the issue was whether it was a mistake. Foy and Simon neither showed that when Brown approved it, she knew Simon was not driving to the job site nor controverted Brown's statement that she later discovered that she made a mistake.

But even without Brown's testimony, the result would not change because Simon's admissions in her deposition supported summary judgment. She testified she left to purchase gas at 8:30 a.m. She admitted that she was not entitled to be paid or record time on her timesheet at that hour because it was one hour before the testing appointment. She testified she did not work on the day of the accident. Simon admitted she only had

approval for travel time for 20 minutes to and 20 minutes from the job site. Her appointment at school was at 9:30 a.m., and the accident occurred at 8:52 a.m. These admissions show the court correctly ruled that the accident occurred "outside the scope" of her approved travel time.

Foy and Simon contend that Simon's declaration in opposition to summary judgment established a triable issue of fact. It stated: "After the accident, it was simply understood that I was working at the time of the accident. . . . I reported it to UCSB because I felt I was working at the time. . . ." She said there was "an understanding that I would simply begin to record my hours when I left my house . . . . This included the time spent when I had to fill my car with gas . . . ." But these conclusory and self-serving statements which contradicted Simon's admissions in her deposition do not create an issue of fact. (*Benavidez v. San Jose Police Dept.*, *supra*, 71 Cal.App.4th at p. 860; *Sinai Memorial Chapel v. Dudler*, *supra*, 231 Cal.App.3d at p. 196.)

But even if the accident occurred during paid time, the Regents were not liable. "The employer is not liable for every act of the employee committed during working hours. [Citation.]" (*Bailey v. Filco, Inc*. (1996) 48 Cal.App.4th 1552, 1560.) "Respondeat superior liability demands a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer." (*Ibid*.) "Payment of travel expenses does not necessarily establish the existence of employer benefit so that the employer should bear responsibility for the risk of injuries . . . ." (*Le Elder v. Rice***,** *supra*, 21 Cal.App.4th at p. 1609, fn. 3.)

Employers do not incur vicarious liability for the employee's torts on paid time where, as here, the employee's activity was personal and not required by the employer. (*Bailey v. Filco*, *Inc.*, *supra*, 48 Cal.App.4th at 1560 [employee outside of scope of employment where during a paid break employee had an accident while driving to buy cookies for employees]; *Anderson v. Pacific Gas and Electric Co*. (1993) 14 Cal.App.4th 254, 262 [employee outside scope of employment even though employer paid a travel allowance and at the time of the accident he was driving co-employee to a park-and ride. Driving the co-employee was consistent with the employer's car pooling

policy, but employer did not require it as part of the job].) In *Le Elder*, as here, the employer's payment for travel expenses was not a significant factor supporting employer liability for an employee's personal errand.

Foy and Simon contend vicarious liability applies because taking her grandchild to school was a minor deviation from Simon's work activities. But in *Le Elder*, the Court of Appeal with a similar fact pattern concluded such a personal trip is a substantial deviation. (*Le Elder v. Rice*, *supra*, 21 Cal.App.4th at p. 1608.) Foy and Simon have not shown that the trial court erred.

III. Continuing the Motion to Permit Discovery

Foy contends that the trial court's continuance of the motion was prejudicial error as it allowed the Regents to depose Brown to fortify their summary judgment motion. We disagree.

The trial court had discretion to continue the motion for summary judgment to permit discovery at the request of the opposing party. (Code Civ. Proc., § 437c, subd. (h).) Foy's opposition to summary judgment stated, "if the court is inclined to grant the Regents' motion, plaintiff respectfully requests that a ruling on the motion be continued until after the plaintiff completes Ms. Brown's deposition . . . ." She also stated, "[t]he court has discretion to continue the motion to permit additional discovery . . . . " At the beginning of the hearing, the court stated it was inclined to either grant summary judgment or grant Foy's request for a continuance. During argument, when the Regents suggested submitting Brown's declaration, Foy's counsel said, "if the Regents are submitting a declaration from Janet Brown, of course we need to take her deposition." Foy used Brown's deposition in her opposition to summary judgment.

In any event, a trial court has discretion to consider evidence not initially included in the defendant's motion for summary judgment. (*Weiss v. Chevron, U.S.A., Inc.* (1988) 204 Cal.App.3d 1094, 1099; *Johnson v. Banducci* (1963) 212 Cal.App.2d 254, 260.) Foy has not shown an abuse of that discretion.

In Foy's reply brief she contends the court erred because Brown's declaration and deposition were not mentioned in the Regents' separate statement of facts.

But she waived this issue because she did not make this objection in the trial court and did not raise this issue in her opening brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

The judgment is affirmed. Costs to respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

Denise deBellefeuille, Judge

Superior Court County of Santa Barbara

Pulverman & Pulverman, Martin E. Pulverman and Raymond J. Pulverman for Plaintiff and Appellant.

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